IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 343

STATE OF NEW YORK, STATE OF DELAWARE, STATE OF INDIANA, ET AL., *Appellants*,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, STATE OF ALABAMA, ET AL.

No. 344.

STATE OF MAINE, STATE OF NEW HAMPSHIRE, STATE OF VERMONT, ET AL., *Appellants*,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

No. 345

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, BEAVER, MEADE AND ENGLEWOOD RAILROAD COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, ET AL., *Appellants*,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, STATE OF ALABAMA, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

REPLY BRIEF FOR THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., (WESTERN RAILROADS).

INDEX.

	PAGE
Statement	2
Argument:	
I. The Commission Found That the Costs of the Western Railroads Are Materially and Substantially Higher Than the Costs of Eastern or Southern Railroads	3
II. The Establishment by the Commission of Reduced Noncompensatory Rates on Western Less-Than-Carload Traffic Is Indefensible	16
III. The Order Is Void Because the Commission Misconstrued the Interstate Commerce Act and the Transportation Act of 1940	38
Conclusion	44
Appendix	45

Table of Cases.

Aetna Insurance Co. v. Hyde, 275 U. S. 440 ..... 35, 36
Ann Arbor R. Co. v. United States, 281 U. S. 658 39
Eastern-Central Motor Carriers Association v. United States, 321 U. S. 194 39
Florida v. United States, 282 U. S. 194 39
New Automobiles in Interstate Commerce, 263 I. C. C. 771 33
New England Divisions Case, 261 U. S. 184 ..... 34, 38
North Carolina v. United States, 325 U. S. 507 ..... 36, 39
Texas & Pacific Ry. Co., 289 U. S. 627 40

Statutes.

Interstate Commerce Act, as amended by Transportation Act, 1940: Sec. 3(1), 54 Stat. 902, 49 U. S. C. Sec. 3(1) 38, 39, 40, 42
Joint Resolution of Jan. 30, 1925 (Hoch-Smith Resolution) 43 Stat. 801, 49 U. S. C. Sec. 55 40

Other Citations.

Interstate Commerce Commission, First Annual Report (1887) 42
O. D. T., General Order No. 1, as amended, C. C. H. Fed. Carriers Serv. ¶ 6321d 21, 26, 28, 29

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STATEMENT.

A large part of the brief of the Government is devoted o a discussion of freight classifications and especially to he Commission's decision in *Consolidated Freight Classifi-*

cation, I. C. C. Docket No. 28310. That proceeding was heard and decided with this *Class Rate Investigation,* but no order was entered therein. The railroads have agreed to prepare a proposed new uniform classification (R. 84f) and the work is now being done. That single classification will supersede the present ones, regardless of the decision in this case.

The fact that there is to be a uniform classification does not mean that the rates for the commodities or classes must be the same in all territories. On the contrary, the Government admits at pages 29 and 30 of its brief that "where differences in geographic conditions produce widely divergent costs, revenue needs, or other factors requiring specific rate adjustments, these adjustments should be made *in the rate levels,* or by legitimate exceptions to the classification, rather than in the basic classification itself; * * *." (See, also, Report, R. 124.) The primary findings of the Commission are that the costs of the Western railroads and their revenue needs, as well as other transportation conditions, are widely divergent from those in the East and South. The necessity for a higher Western rate level in no way prevents the adoption of the classification which the railroads themselves are now preparing. For many years there has been a single uniform classification in effect throughout the West which has applied in connection with different levels of class rates which the Commission has long maintained within the Western Territory.

I.

THE COMMISSION FOUND THAT THE COSTS OF THE WESTERN RAILROADS ARE MATERIALLY AND SUBSTANTIALLY HIGHER THAN THE COSTS OF EASTERN OR SOUTHERN RAILROADS.

The Government (as well as the Southern group of states) concedes that the Western costs are higher than the costs in either the East or the South and urges the generality that they are "not sufficiently different to warrant territorial rate differentials." (p. 180.) When it came to the actual findings measuring the amount of the territorial costs, however, it found that it simply could not explain away the large territorial differences, and evidently decided that it was best not to discuss them. The Commission's many cost comparisons are set out in our principal brief and are unchallenged in the Government's brief.

We ask the Court to note particularly the Government's treatment of the two most significant territorial cost comparisons in the case, namely, the costs pertaining to less-than-carload traffic and those which show the average freight transportation costs for all traffic. The less-than-carload costs are especially important because most less-than-carload traffic in both Eastern and Western territories moves on the class rates.[1] (Report, R. 184.) These

[1] The revenues from less-than-carload traffic of the Western railroads in 1939 were $87,355,186 (R. 7606) which is 6.77% of the total Western gross freight revenues (Report, R. 226) and is 49% of the total Western net railway operating income for that year. Reductions in the rates on less-than-carload traffic would be reflected, by approximately the same dollar amounts, in reductions in the net railway operating income. The rates on that traffic are of great importance to the Western railroads.

costs, therefore, unlike the others, directly measure the territorial differences in the transportation cost of class rate traffic that is involved in this case.

The Commission, after detailed examination of this less-than-carload traffic, found in the text of its report that *"Costs in the West are 27 percent higher than in the East, including New England but excluding Pocahontas."*[1] (Report, R. 206.) In its statistical findings for the several mileages, it found that the Western less-than-carload costs are from 27.6 percent to 40 percent higher than in the East, and are from 38 percent to 46 percent higher than in the South. (See our principal brief, pp. 31, 45.) The *sole* reference in the Government's brief to these fundamental findings reads as follows:

> "The less-carload West-East cost comparisons will be treated in the later section of this brief on confiscation * * *." (p. 167.)

Despite that promise, neither that later section nor any other part of that brief contains even the slightest mention of these West-East or West-South cost comparisons.

The Government and the Commission have offered no reason in this Court, in the District Court or in the Commission's reports, why a territorial difference in transportation costs of from 27.6 percent to 46 percent is not a substantial difference which must be reflected in the rate levels, as it has been for fifty years. Nor have they offered any reason (aside from the alleged Congressional mandate for bringing about equalization) as to why it has become unlawful for the Western railroads to charge any more for their services than is just and reasonable for Eastern and Southern railroads whose costs are so much lower.

The other most important comparison in the Commission's findings is that which shows that the Western freight

[1] Italics are ours unless otherwise indicated.

transportation costs for all traffic, including both carload and less-than-carload, are more than 21 percent higher than the Eastern costs. (See our principal brief, pp. 26-29.) Here, again, the Government makes no denial of the finding.[1] Nor does it deny or even mention the Commission's finding that Western costs are so high that, if the low Eastern rates had applied to the Western railroads in the test year, the Western railroads would have had an operating *deficit* of $5,154,703, as compared with the Eastern net railway operating *income* of $252,863,974 in that year on that same revenue level. Instead, it suggests only the additional consideration that the freight operating ratios of the Western railroads in the war years were less than those of Eastern railroads. (pp. 169-170.) It does not explain that those ratios merely show what proportion the freight costs bear to the freight revenues. Since the Western freight revenue level is approximately 16.6 percent higher than the Eastern, any possible comparisons of the territorial operating ratios with a purpose of comparing the costs requires an allowance for that higher revenue level. When that allowance is made, the adjusted freight operating ratio of the Western roads in every year is less favorable than for the Eastern roads.

The difficulties of the Western railroads in their struggle to maintain their solvency despite the higher Western

[1] Both in its brief in the District Court (p. 125) and in oral argument to that court (Transcript of oral arguments, p. 365) the Government urged that the Commission's order should be upheld with respect to the Southern railroads because the Commission's comparison of revenue levels and rates of return showed that the Southern level of costs equals or approximates that of the East. The Government has never been able to explain why the Commission's decision reducing Western rates to the level of the Eastern railroads is not arbitrary when the same findings as to the West show that the Western level of costs is more than 21 percent *higher* than that of the East.

freight costs are accentuated by the fact that, as the Government concedes in this connection on page 170, the passenger deficits in the West "are far more unfavorable than in the East." In the words of the Government, the passenger deficit was properly distributed by the Commission in its cost findings "as a burden which the carload traffic as a whole must bear if the various services, including the carload freight service itself, are to survive." (p. 238.) The burden of the high direct freight costs in the West is therefore increased by the deficit arising from the fact that costs of passenger traffic in the West, like the costs of freight traffic, are much more unfavorable than in the East. In view of the Government's reference to the passenger deficit, it may be noted that this deficit in the West for the test year, 1939, exceeded the passenger deficit in the East by $42,596,400. (1939 I. C. C. Statistics of Railways, stipulated into record at R. 4777.) This figure is large, but is dwarfed by the Commission's finding that the Western freight revenues alone would have been decreased by $183,270,259 if the Western freight revenue level had been reduced to the Eastern level, thereby creating an actual operating deficit. (See our principal brief, p. 28.)

The Government refers at pages 165 and 166 to the Commission's statement that between 1939 and 1941 the unit costs decreased more in the West and South than in the East. It does not mention, and cannot explain away the fact that, if it were proper to project the 1939 studies into 1941 on the basis suggested by it,[1] the Western costs for

[1] The Government concedes that there was no comparative cost study for 1941 and that "costs of different territories cannot be compared in terms of one unit alone," such as the 1941 figures in the record. (p. 162, fn.) It contends, however, that by the use of those 1941 figures within each territory, the changes in that territory can be projected to 1941 from 1939, the year of the only cost study, "with results substantially as accurate as if an entire new

the less-than-carload traffic would be from 24 percent (for 500 miles) to 28 percent (for 100 miles) *higher* than the Eastern costs even if Pocahontas be excluded from the Eastern costs.[1] Moreover, since the unit costs in the South are stated to have decreased in exactly the same proportion as those in the West, the costs for this traffic would continue in 1941 to be from 38 percent to 46 percent higher in the West than the costs of the Southern railroads. (See our principal brief, p. 45.)

Since the Government now says (independently of any evidence or finding of the Commission) that the 1941 traffic level is "expected to prevail in the post-war period" (p. 165), the foregoing cost comparisons have especial significance. It is these differences, ranging up to 46 percent in that year, that must be wholly disregarded if the Western rates are to be reduced to the level of the low-cost Eastern and Southern railroads.

The Government's emphasis on 1941 as being the norm of the future lends additional significance to the Commission's finding that, notwithstanding their 16.6 percent higher revenue level, the Western roads in that year earned the lowest rate of return in the nation. The handicap of the high Western costs was so great that the higher Western rate level was insufficient to match the difference

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costs study were made." No citation to the record was or could be given. This conclusion is wholly without support in the record and is flatly contrary to the testimony of the Commission's head cost analyst, who prepared the cost study for 1939 and who also assembled, from the annual reports, the general figures for 1941. (See our principal brief, p. 52 fn.)

[1] The measurement of the cost differential at 100 miles is explained on page 52 of our principal brief; the differential at 500 miles is computed from the Commission's table on page 31 of our principal brief by the same method.

in costs. The rates of return for that year were as follows (Report, R. 259):

Eastern:	
(a) Other than Pocahontas	3.62%
(b) Pocahontas	6.67%
Southern:	4.24%
Western:	3.36%

If the Western rates in 1941 had been on the Eastern level, the actual Western net railway operating income of $370,938,129 would have been reduced to $123,218,997. (See our principal brief, p. 61.) This would have reduced the Western rate of return to 1.12 percent as compared with the Eastern rates of return of 3.62 percent and 6.67 percent on that same level of rates. In other words, the Commission's action in holding that the Western rates are unlawful unless reduced to the basis that is just and reasonable for the East is condemned as arbitrary by the results of the very year that the Government would choose as being typical of post-war conditions.

For the latest year, 1946, the advance reports have now been compiled and show that the net railway operating income of the Western railroads was $318,107,614. The dependency of the Western railroads on their higher rates was demonstrated again in that year. If the Western rates in 1946 had been on the lower Eastern level, not only would that operating income have been entirely lost, but there would have been an operating *deficit* of $44,700,000. In contrast, the Eastern railroads, on their lower rates, had a net railway operating income of $208,601,753, of which $146,144,487 was the income of Eastern railroads other than those in Pocahontas region.

The final justification offered by the Government and the Commission for reducing the Western rates in disregard of the territorial differences in costs and other

transportation conditions wholly negatives the contention that those differences are inconsequential. It is as follows:

> "Further, the western roads have complained for years about their inadequate share of divisions with the eastern roads (see I. C. C. Docket No. 28277), and readjustment of divisions is the appropriate cure for this kind of a revenue problem. *New England Divisions Case*, 261 U. S. 184." (p. 170)

In other words, having reduced the Western rates to parity with the East, in disregard of the costs and other transportation conditions, the Commission in the same breath invites the Western roads to initiate a divisions case against the Eastern roads, based on those very differences in costs and transportation conditions. The Western divisions are already in excess of the Eastern divisions, mile for mile. The disease to which the Commission and the Government referred is the loss which would be caused by this arbitrary order depressing the Western rates. "The appropriate cure," as the Commission now suggests, would be an order compensating the Western railroads out of the earnings of the Eastern railroads, which, in turn, would be derived from the increased charges assessed upon the Eastern shippers. But those increases are held to be necessary to bring the Eastern roads' own rates up to the level of reasonableness. This amazing suggestion of the Commission and the Government bares the arbitrary character of this rate order in reducing Western rates to establish identical rates in territories of vastly different transportation conditions. The Commission exceeds its legislative authority in issuing an order that would cause such a blight to the Western railroads, and this is nonetheless true because counsel at once offer to "cure" the noxious effects of this action by increasing the Western divisions.

The Government Finds It Necessary to Rely on Findings Which the Commission Did Not Make.

Because of the erroneous paraphrasing of the Commission's findings at several places in the Government's brief, (*e. g.*, at pp. 169, 180) we ask the Court particularly to note that (a) the Commission made no finding that the transportation costs of the Western railroads are not substantially higher than those in the East or South, and (b) the Commission made no finding that the highe Western costs would not justify and warrant substantial territorial rate differentials. The only finding on this point was carefully written and is as follows:

> "Applying the foregoing principles to the issues in this proceeding, there is no doubt that, based on cost of service considerations, the differences in levels, schemes, and progressions of scales *that at present occur* in the several territorial class-rate structures here under review are not justified." (Report, R. 309.)

All the paraphrases of that finding in the Government's brief omit the same vital part of the finding, namely, the part that restricts it to the differences "that at present occur." It would be wholly unfair to the Western railroads to measure the lawfulness of the Western rates by comparison with Eastern rates which the Commission in the same proceeding found to be "below a just and reasonable level" and therefore unlawful, entirely aside from any unlawfulness arising from their relation to the Western rates. (Report, R. 467.) The Commission made no finding (and could not reasonably have made any such finding), that the territorial differences in transportation costs do not fully justify the difference between (a) the new rates which it found to be just and reasonable for the Eastern railroads and (b) the present levels of rates for the West. For example, the present first-class West-

ern Zones I, II and III rates for the 300-mile haul are, respectively, 106%, 122% and 134% of the permanent rates found to be just and reasonable for the East. The arithmetical average of these Western rates is 121%. The difference in territorial costs for less-than-carload traffic between the West and the East, even excluding the Pocahontas region of the East, was found by the Commission to be from 27.6 percent to 33.7 percent. (See our principal brief, p. 31.) The difference in overall freight transportation costs was found by it to be more than 21 percent. (See our principal brief, pp. 26-29.) Nowhere in the report is there a finding that these differences are not material and substantial; instead, they both support and require the continued maintenance of higher rate levels in the West.

We especially ask the Court to note the wide gulf between the Commission's finding, quoted above, and a finding, which the Commission did *not* make, that "cost of service considerations" warrant the absolute rate uniformity which the Commission would prescribe.

The Commission and the Government state in their brief:

> "What else could the prohibition against discrimination in Section 3(1) mean except a mandate for rate uniformity *under substantially similar circumstances?*" (p. 84.)

But the Commission does not find that "substantially similar circumstances" exist as between the West and the East and South. No such finding could be made in the face of the Commission's primary findings showing the substantial differences in such circumstances. We suggest that the Government's statement, quoted above, carries a tacit admission that the finding actually made by the Commission falls far short of sustaining its requirement that, in order to be lawful, the rates must be uniform.

Comments on the Brief for the States of Arkansas, et al.

The States of Arkansas, *et al.*, have filed a brief containing, in part, a discussion of the relative territorial costs. Their principal point is that we treated Pocahontas territory as a part of Official (or Eastern) Territory and considered actual average loading rather than assumed identical loading as a proper test for relative costs. (See p. 9.) The answer is that we stated the comparisons just as the Commission made them. They are the Commission's findings, not ours. In some comparisons the Commission stated separately the costs for Pocahontas and Eastern including New England but excluding Pocahontas; at other points it combined them. We have reproduced those findings. We would be glad to compare the Western costs with the combined costs for all regions or territories east of Western territory, but the Commission made no such combined findings. However, it may be noted that the less-than-carload cost comparisons for Eastern including New England but *excluding* Pocahontas show the actual Western costs to be 28 percent, 30 percent and 34 percent higher for the respective mileages. (See our principal brief, p. 31.) Moreover, the finding that the Western freight transportation costs for all traffic are 21 percent higher than for Eastern, also is made for Eastern *excluding* Pocahontas.[1]

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[1] The States of Arkansas, *et al.* err in saying that Pocahontas "is not, and was not treated by the Commission as, a part of official Territory" (p. 10). The Commission stated, *per contra*, that "most of the Pocahontas region is in official territory." (Report, R. 220.) The Government says that the Pocahontas lines are so integrated in the structure of Official Territory that their competitors cannot be given differentially higher rates "because this would divert even more traffic to the Pocahontas lines and make them even more profitable in relation to the other roads." (p. 171.)

The answer to the criticism about considering actual average loading rather than identical loading is the same. We showed them just as the Commission found them. It was the Commission which held that the actual loading figures, rather than a theoretical comparison of identical loadings, were the proper test for relative costs and used only that basis in its "Summary," finding that "Costs in the West are 27 percent higher than in the East, including New England but excluding Pocahontas." (Report, R. 206.) The correctness of the Commission's finding as to the costs on the basis of actual average loading being the proper measure of relative territorial costs is apparent from the fact that the average loading of such traffic is principally controlled by the relative density. Where, as in the East, population is relatively heavy and towns and cities are close together, the cars carrying less-than-carload freight can be loaded more heavily without unreasonably delaying service. In the West, the population is thin, the towns and cities are far apart and the density of traffic is also light. These differences result in the relatively lighter loadings.

Arkansas, *et al.*, also argue (pp. 12-13) that it is improper to say "the Commission found" that the relative costs were what are stated by the Commission in the report, because the Commission also found that the out-of-pocket expenses were something else, and that in some instances these out-of-pocket expenses are higher in the East than in the West. It can hardly be argued seriously that the reduction of the Western rates to the level of the Eastern rates is justified on the ground that, if all the fixed or constant costs are disregarded, the out-of-pocket expenses are similar. To do so, of course, is to disregard in its entirety the whole effect of differences in density of traffic, for the principal transportation advantage of the Eastern railroads over the Western roads lies in the fact

that their density of traffic is so heavy that they can spread their constant or fixed costs over more units of traffic and therefore have been able to produce substantial profits on rates which, the Commission found, would have produced operating deficits for the Western lines.

Arkansas, *et al.*, criticize the cost comparisons showing higher costs in the West because they are based on cost data which included Mountain-Pacific Territory in the Western costs. (p. 14.) Here, again, we have merely shown the Commission's own comparisons and findings. The Commission stated that the reason for not showing separately the costs for Western Trunk Line, Southwestern and Mountain-Pacific Territories was that the "cost studies indicate that the differences between the costs shown for the total West and the costs for these three rate territories considered separately are relatively small." (Report, R. 193.) At pages 14 and 15 of their brief, the States of Arkansas, *et al.*, challenge this finding by referring to a part of the data in Exhibit 3 (R. 5267) which was not adopted by the Commission. The author of that exhibit, who directed the preparation of the cost studies, later reworked his data to avoid distortions which he recognized as being contained in Exhibit 3. He testified that although the earlier exhibit had certain usefulness, "In view of the refinements incorporated in Exhibit 13, Table 1, and my Exhibit [196], Identification A, Table 1, future cost comparisons should be related to the data appearing in these exhibits." (R. 11330.) The Commission's findings, in accordance with this testimony, are related to the later cost comparisons, in contrast to the distorted data in the earlier exhibit.[1]

[1] These comments apply also to a similar example lifted from that same Exhibit 3 and reproduced in the Government's brief at pages 168-9 purporting to show, contrary to the Commission's findings, that if certain costs are excluded, the remaining costs would be about the same in the

At page 16, Arkansas, *et al.* say that the Commission "properly drew the conclusion that the costs of transportation as between the two territories did not differ substantially." The Commission made no such finding and, in view of the size of the cost differentials, could not have done so. It found the amounts of the differences between the territories, as shown in our brief. In its supplemental report (R. 467) it found that the Eastern rates were "less than just and reasonable" and it found that the spread between *those* Eastern rates and the Western rates was not justified by the differences in the costs, but it made no finding that the differences in cost are not substantial. Similarly, it made no finding that the spread between the present Western rates and the newly-prescribed Eastern rates, (which spread is less than the differential in costs) is not justified by that cost differential.

Finally, Arkansas, *et al.*, advance the unique suggestion that the Commission was wrong in finding the density of traffic to be as stated on page 56 of our brief, on the ground that miles of track should have been used as the measure instead of miles of line. (p. 17.) Here, again, we took the Commission's own measure of the relative density of traffic. Traffic densities have never been compared on any other basis by the Commission or anyone else, and for obvious reasons. It is common knowledge that the expenses of original investment and maintenance for two single-track miles of line substantially exceed such expenses for one double-track mile of line. The handicap of light traffic in the West, relative to the total size of the Western railroad system is, unfortunately, very real in comparison with the density of the Eastern railroads.

West as in the East. The author of the exhibit testified that the so-called "cost level II," referred to by the Government could not be used either for the purpose of determining minimum rates or maximum rates but was merely a base figure for further computations. (R. 1564.)

II.

THE ESTABLISHMENT BY THE COMMISSION OF REDUCED NON-COMPENSATORY RATES ON WESTERN LESS-THAN-CARLOAD TRAFFIC IS INDEFENSIBLE.

The Government defends the reduced rates which the Commission would force upon the Western roads for application to the less-than-carload traffic by contending that the Commission is engaged in changing the "rate structure of the United States" (p. 245), that the less-than-carload traffic of the Western railroads is only a small part of the total traffic in the country and that to require the Commission to refrain from reducing the Western less-than-carload rates below costs would be to require it to pursue a "will-o'-the-wisp ideal" (pp. 243-244). It further contends that the Commission is authorized to set rates for a group of carriers on evidence and findings that the group costs for the traffic in question exceed the reduced group rates, despite the admitted presumption that the average conditions are typical of each carrier, and contends that such action is neither arbitrary nor confiscatory, but is entirely lawful. (pp. 245-249.)

The Government suggests that, after all, there is no real harm done by the order because, it is said, the Western railroads have it within their power "to eliminate any fancied small inequities which they may feel will result from this monumental, unprecedented achievement in the field of rate making." (p. 245.) This alleged power to right the wrong which would be done under the order is said to be the power "to propose classification differences between carload and less-carload traffic, which will eliminate any grievances they claim to have about the noncom-

pensatory character of less-carload rates in the West." (p. 235.) Thus, the Government would justify the issuance of the arbitrary and confiscatory order reducing the rates on the theory that it could not cause any harm because the Western railroads could restore the rates to their former level by the device of increasing the classification.

We fully agree with the Government that the Commission's action is "unprecedented." We wholly disagree with the theory that it is immaterial to the lawfulness of the Commission's order that, for the purpose of equalizing rates, it would reduce our less-than-carload rates below cost. We also disagree with the proposition that no harm is done because this is a "fancied small inequity" which can be remedied by restoring the Western rates to their previous level by a proposed change in classifications. This latter suggestion of the Government is of the same nature as its contention on p. 170 that it is proper to reduce the Western rates in disregard of the higher Western costs because "the appropriate cure" for the resulting condition would be an application to the Commission for an increase in the Western roads' share of the rate divisions.

The effect of the Commission's order upon Western less-than-carload rates and revenues cannot be lightly disregarded as *de minimis*. In the test year, 1939, the Western roads carried 7,058,025 tons of less-than-carload freight. From that freight they derived revenues of $87,355,186. (R. 7606.) This was 6.77 percent of the total Western gross freight revenues in that year. (Report, R. 226.) It was 49 percent as large as the total Western net railway operating income. The loss of millions of dollars annually which would be caused by the Commission's order cannot be dismissed as mere "fancied small inequity."

The very substantial deficits which would be caused by

the reduced rates are shown in the tables in our principal brief at pages 106 to 115. With one minor exception,[1] the Government does not question the accuracy of those measurements of the degree by which the reduced rates would fail to compensate the Western railroads for their costs. The Government says, however, that these deficits would apply only to "a fraction even of the less-carload class rate traffic in the West." (p. 237.) This contention is repeated in a number of forms on different pages. The argument, apparently, is that since the tables directly show only the rates on third-class and fourth-class traffic, the confiscation is therefore inconsequential. The validity of this proposition may be tested by reference to the statement on page 239 of the Government's brief that "the average class rate less-carload traffic in the West moves at a rate higher than the third class rate (R. 1404)." The Commission, on the contrary, made the following finding:

> "In all three territories the average rate on such less-than-carload traffic is above fourth class and below third class (fourth class being 50 percent in official and 55 percent in western and southern classifications, and third class being 70 percent of first class in all three territories)." (Report, R. 183.)

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[1] The average Western cost of pickup and delivery expense, (which is computed by dividing the territorial total of such expenses by the total number of 100 pound units of less-than-carload traffic) was 10 cents per cwt. in 1939 and 14 cents by January 1, 1946. Our tables show average costs and therefore use these respective figures. The Government suggests that, since some of the total less-than-carload traffic does not receive this service, the average amount as used in the tables should be reduced. (p. 237.) The error in this argument, as the Commission mentioned in connection with the same computation for Eastern Territory, is that if the pickup and delivery expenses were spread only over the traffic that receives the service, the cost for that traffic would be *higher* than the averages which were used. (Report, R. 199-200.)

The Government does not refer to this finding, but refers only to R. 1404, which is merely a computation handed to the District Court by Government counsel in the course of the arguments before the District Court, unsupported by any witness. According to that computation, the Commission was wrong in finding that the average Western less-than-carload class traffic moves at a rate less than 70 percent, but only because the computation claims that the average rate is 70.67 percent!

In other words, the Commission has found that the average rate is less than third class (70 percent) and more than fourth class (55 percent); Government counsel argue that the average rate is 70.67 percent; and the Commission's findings show that the reduced rates will be decidedly noncompensatory at the 70 percent rate as well as at the lower rates. The reduced rates for the *average* traffic, rather than just for a small "fraction" or "segment" of the traffic, are shown by the cost findings to be confiscatory both on the interim rates and on the permanent rates.

In view of the Government's comments concerning the number of classes on which the rates would be confiscatory, we set out the table below which shows the amount of the deficits that would be incurred throughout Western Territory on the first class and second class rates. These are the rates which were found by the Commission to be the new lawful rates for the entire country east of the Rocky Mountains, to become effective, pursuant to this decision, immediately upon the completion of the new classification which is now being prepared. As the Government states on page 256, this is a uniform "independent scale in terms of dollars and cents by mileage blocks, and when it goes into effect, it will supersede whatever scales of class rates are then in effect." The costs are the Commission's own

costs as found by it for the normal peacetime loading, adjusted to the increased levels of prices, wages and taxes as of January 1, 1946.

DEFICIT PER CWT: THROUGHOUT WESTERN TERRITORY ON REDUCED UNIFORM PERMANENT *First*-CLASS AND *Second*-CLASS RATES

(Out-of-pocket costs plus constant costs solely related to less-than-carload traffic and excluding all common constant costs, on basis of *4.3 tons* loading.)

Miles	Jan. 1, '46 Costs	First Class (Permanent)		Second Class (Permanent)	
		Rates	Deficit	Rates	Deficit
100	$0.91	$0.70	$0.21	$0.60	$0.31
300	1.21	1.10	0.11	0.94	0.27
500	1.52	1.40	0.12	1.19	0.33
700	1.83	1.70	0.13	1.45	0.38
900	2.13	1.99	0.14	1.69	0.44
1000	2.29	2.13	0.16	1.81	0.48

It will be seen that the Western railroads, under the Commission's rates, would be compelled to sell their services for much less than cost. At the first-class (100 percent) rates, the rates would fall short of covering the costs by from 11 cents to 21 cents per hundred pounds. At the second-class (85 percent) rates, the corresponding deficits would range from 27 cents to 48 cents.

At page 233, the Government says that the Western railroads "compared less-carload costs with *all* less-carload revenues, instead of only *class-rate* less-carload revenues • • •" (Italics theirs). The facts, to the contrary, are that each of the deficit tables set out in our brief compares the Commission's less-carload costs with the Commission's less-carload class rates. In addition, we also set out separately the finding made expressly by the Commission itself with respect to the existing deficits arising from the

transportation of all less-than-carload traffic, both in the East and the West. It was on the basis of that finding that the Commission ordered an increase in the Eastern rates, to reduce the Eastern deficit, but ordered a reduction in the Western rates to achieve equalization, thereby increasing the Western deficit.

The Government states at page 235 that "the carriers have within their sole control the entire question of how expensive they want to make the less-carload service, through heavy or light loadings, speed of service, ratio of empty return cars, methods of loading freight so as to reduce damage claims, substitution of auxiliary truck service, etc." If this were so, the dream of the railway executives would indeed have come true. Of course, it is without support either in the record or in common knowledge. The citations are to testimony that the carriers will strive to reduce their costs and to provide good service, and that, as compared with the 4.3 tons which has been the approximate average Western loading since the 1920's, (see our principal brief, p. 108) the best that the Western railroads could hope for will be a loading of about five tons after the lifting of the O.D.T. wartime General Order No. 1. (R. 911.) The other citation in alleged support of the Utopia described by the Government is to testimony that the Pennsylvania railroad, operating in the industrialized northeast, where towns and cities are close together and traffic is available, has had a loading (prior to the O.D.T. wartime minimum order) of 6 tons in 1936, 1937, 1938 and 1939, 7 tons in 1940 and 8 tons in 1941. The Government does not mention that these loadings were produced under Eastern rates which the Commission, in this order, has held to be below a just and reasonable minimum. It may be noted here that the Commission has made no finding whatsoever that the Western railroads are operated less efficiently than the Eastern railroads. Indeed, the Govern-

ment in its brief in this Court (p. 177) points out that the Western railroads, working against their unfavorable traffic and transportation conditions, have achieved relatively greater efficiency and economy than have the Eastern railroads even though there remain the cost differences found by the Commission.

The Reduced Rates Would Be Below Cost in All Three Western Zones.

The Government says that the showing of deficits under the new rates applies only to Zone I. (pp. 236, 239.) The facts are decidedly otherwise. Both on the uniform permanent scale and on the interim scales, the rates would be confiscatory throughout Western Territory. Each table set out in our principal brief (pp. 106 to 115) as well as the table set out above at page 20, shows the Commission's findings on costs throughout all three zones, compared with the uniform rates prescribed by the Commission for application throughout all three zones. *Each table shows that the uniform rates would produce consistent and heavy deficits throughout the West.*

For the sake of simplicity, the tables in our principal brief showed the interim rates and interim deficits only for Zone I. The Government well knows that the Commission's findings also show that those interim rates would be at deficit levels in each of the other two zones. We show below the amounts of those interim deficits in Zones II and III. Zone II rates apply in part of Western Trunk Line Territory. Zone III rates apply in another part of Western Trunk Line Territory and throughout Southwestern Territory. The costs shown in these tables are the identical costs shown in the corresponding tables of our principal brief. (pp. 113, 114 and 115.)

The first table measures the amount of these deficits on

the third-class traffic; the Commission found that the average Western less-than-carload traffic takes a rate *below* third class:

DEFICIT PER CWT. ON *Third*-CLASS REDUCED RATES.
(Out-of-pocket costs plus constant costs solely related to less-than-carload traffic and excluding all common constant costs, on basis of *4.3 tons* loading.)

Miles	Jan. 1, '46 Costs	Zone II Interim Rates	Zone II Interim Deficit	Zone III Interim Rates	Zone III Interim Deficit
100	$0.91	$0.53	$0.38	$0.57	$0.34
300	1.21	0.85	0.36	0.92	0.29
500	1.52	1.12	0.40	1.23	0.29
700	1.83	1.40	0.43	1.54	0.29
900	2.13	1.61	0.52	1.78	0.35
1000	2.29	1.72	0.57	1.89	0.40

The following table measures the amount of the interim deficits on fourth-class traffic in Zones II and III.

DEFICIT PER CWT. ON REDUCED *Fourth*-CLASS RATES.
(Out-of-pocket costs plus constant costs solely related to less-than-carload traffic and excluding all common constant costs, on basis of *4.3 tons* loading.)

Miles	Jan. 1, '46 Costs	Zone II Interim Rates	Zone II Interim Deficit	Zone III Interim Rates	Zone III Interim Deficit
100	$0.91	$0.41	$0.50	$0.45	$0.46
300	1.21	0.67	0.54	0.73	0.48
500	1.52	0.88	0.64	0.97	0.55
700	1.83	1.10	0.73	1.21	0.62
900	2.13	1.27	0.86	1.40	0.73
1000	2.29	1.35	0.94	1.49	0.80

It will be seen that the reduced rates prescribed by the Commission for the interim period pending the effective date of the prescribed *lower* uniform rates would produce heavy losses at every mileage. In Zone III, which is the *highest* rated zone, and on third-class traffic, which is *above* the average, the deficits per hundred pounds would range from 29 cents to 40 cents. In terms of the rates in that zone, the costs would be higher than the rates by from 19 percent to 60 percent. On the fourth-class traffic in that highest-rated zone, the deficits would range from 46 cents to 80 cents per hundred pounds. The costs would be higher than the rates by from 51 percent to 102 percent.[1]

In Zone II, of course, the tables above show that the losses which would be caused by the reduced interim rates would be greater than in Zone III, and would range up to 94 cents per hundred pounds. The costs in that Zone II would be higher than the rates by from 31 percent to 122 percent.

If the admitted increases in prices, wages and taxes since 1939 were to be disregarded, still the prescribed interim rates, as well as the permanent rates, would be noncompensatory in Zones II and III as well as Zone I. The following table shows the comparison of the relatively low 1939 costs with the interim *third*-class rates for Zones II and III:

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[1] These drastic losses may be contrasted to the Government's suggestion on page 237 fn. that the new permanent rates will partly compensate the Western railroads for their losses on all this Zone III traffic moving farther than 20 miles by adding one penny to the rate for that part of the Zone III traffic which moves no less than 6 miles and no more than 20 miles.

DEFICIT PER CWT. UNDER REDUCED *Third*-CLASS RATES.

(Out-of-pocket costs plus constant costs solely related to less-than-carload traffic and excluding all common constant costs, on basis of *4.3 tons* loading.)

		ZONE II Interim		ZONE III Interim	
Miles	1939 Costs	Rates	Deficit	Rates	Deficit
100	$0.73	$0.53	$0.20	$0.57	$0.16
300	0.98	0.85	0.13	0.92	0.06
500	1.24	1.12	0.12	1.23	0.01
700	1.49	1.40	0.09	1.54	+0.05
900	1.74	1.61	0.13	1.78	+0.04
1000	1.87	1.72	0.15	1.89	+0.02

Note: "+" represents excess.

The following table shows the comparison of the relatively low 1939 costs with the interim *fourth*-class rates for Zones II and III.

DEFICIT PER CWT. UNDER REDUCED *Fourth*-CLASS RATES.

(Out-of-pocket costs plus constant costs solely related to less-than-carload traffic and excluding all common constant costs, on basis of *4.3 tons* loading.)

		ZONE II Interim		ZONE III Interim	
Miles	1939 Costs	Rates	Deficit	Rates	Deficit
100	$0.73	$0.41	$0.32	$0.45	$0.28
300	0.98	0.67	0.31	0.73	0.25
500	1.24	0.88	0.36	0.97	0.27
700	1.49	1.10	0.39	1.21	0.28
900	1.74	1.27	0.47	1.40	0.34
1000	1.87	1.35	0.52	1.49	0.38

The foregoing 1939 costs are the exact costs of the Commission itself without any adjustment for the increases in prices, etc., since that date. They are unquestioned by the Government. They show that the reduced interim rates for the average traffic would produce deficits in Zones II and III up to 52 cents per hundred pounds.

Even under the wartime O. D. T. loading order, the highest Western average loading was only 9 tons, and in 1946, under that order, was 8.7 tons. (See p. 28, *infra.*) Because of the Government's discussion of a theoretical 10-ton loading, however, it is of interest to note the deficit that would be brought about by the Commission's order even on the unusual hypothesis that after the removal of the high minimum load requirements, the loading would increase instead of return to normal. Loading, of course, affects costs. The following table shows the deficits on that 10-ton loading basis, in the two higher-rated Western zones.

DEFICIT PER CWT. ON REDUCED *Fourth*-CLASS RATES.
(Out-of-pocket costs plus constant costs solely related to less-than-carload traffic and excluding all common constant costs, on basis of *10-ton* loading.)

		ZONE II Interim		ZONE III Interim	
Miles	Jan. 1, '46 Costs	Rates	Deficit	Rates	Deficit
100	$0.76	$0.41	$0.35	$0.45	$0.31
300	0.92	0.67	0.25	0.73	0.19
500	1.08	0.88	0.20	0.97	0.11
700	1.24	1.10	0.14	1.21	0.03
900	1.40	1.27	0.13	1.40	—
1000	1.48	1.35	0.13	1.49	+0.01

Note: "+" represents excess.

These losses in Zone II under the Commission's orders, on that assumed 10-ton loading, would be from 13 cents to 35 cents per hundred pounds, and, in Zone III, would be as much as 31 cents per hundred pounds.

All of the foregoing deficits are in Zones II and III and are under the interim rates. Under the even lower permanent rates, as shown in our principal brief, the losses

throughout all the Western zones, under the normal loading and at the third-class rate would be from a minimum of 42 cents per hundred pounds up to 80 cents per hundred pounds. (See our principal brief, p. 113.) And, even on the hypothetical 10-ton loading basis, those losses under the permanent rates would range up to 27 cents per hundred pounds on the third-class rates and from 30 cents to 37 cents on the fourth-class rates. (See our principal brief, p. 115.)

The Government's Charts.

We ask the Court to note particularly the two charts inserted in the Government's brief opposite page 240. The first chart is restricted (a) to the *out-of-pocket* costs only and (b) to the level of those out-of-pocket costs at an average *10-ton* loading and (c) to the interim "stop-gap" rates, not the permanent rates prescribed by the Commission as lawful.

The Government simply could not deal with the actual costs of this traffic as compared with the reduced rates which the Commission would compel. There are three elements of costs of this traffic as found by the Commission. The first is the constant or fixed costs which are common both to carload and to less-than-carload traffic. The Commission found that those costs are, in part, chargeable to less-than-carload traffic, but, in the actual computations of its figures for less-than-carload costs, it wholly omitted those common constant costs. The cost comparisons and deficits which we have set out in our brief, therefore, also omit them, although all parties agree that they are properly chargeable to this traffic. The second cost element consists of those constant costs which are solely related to less-than-carload traffic. An example of this kind would be a freight loading platform or station which handles nothing but less-than-carload freight. These costs were included by the

Commission in the less-than-carload cost findings, but are wholly omitted in the Government's chart. The third element is the out-of-pocket costs. The Government's chart shows *only* this third element of the costs. If the solely related constant costs were added to the January 1, 1946, costs on the Government's chart, the costs would be shown to be higher than the rates of fourth-class traffic throughout all three Western zones. They would be higher than the rates for third class traffic in Zone III on all traffic up to 300 miles, in Zone II on all traffic up to 430 miles and in Zone I on all traffic up to 830 miles. The weighted average traffic is between third class and fourth class.

But the chart is revealingly defective for another reason. Costs vary with the amount of the loading. The Government's chart shows only what the out-of-pocket costs would be if there were an average loading of 10 tons. The average Western loading in the test year, 1939, was 4.3 tons and that had been the approximate average since at least the middle of the 1920's. (See our principal brief, p. 108.) It continued to be the approximate average until the wartime O. D. T. order which provided for 36-hour delays and other interruptions of service to increase the loading to 10 tons, but subject to several exceptions. There is no evidence that the average loading, either in the West or in the country as a whole, has ever reached 10 tons. The average loadings of less-than-carload traffic for 1944, 1945 and 1946 were as follows:

ACTUAL AVERAGE LOADINGS UNDER O. D. T. WAR POWERS ORDER.[1]

	United States	Western
1944	9.2 tons	9.0 tons
1945	9.1 tons	9.0 tons
1946	9.2 tons	8.7 tons

[1] From monthly reports of O. D. T. to Car Service Division, Association of American Railroads.

Notwithstanding the O. D. T. orders, with their admittedly unfortunate but necessary hardships to shippers, the average Western loading in 1946 was only 8.7 tons. Those wartime orders, of course, are soon to be removed. The evidence shows that with continued efficiency the post-war Western loading will continue in the same range as the prewar loading. (R. 910-911.) There is no finding (and there could not have been any finding) that the post-war Western average would rise to 10 tons. Yet the Government has stated the out-of-pocket costs *only* on that 10-ton basis.

Finally, the Government has refrained from showing the uniform rates which the Commission has found to be lawful for the West as for the East. Instead, it shows *only* the temporary rates prescribed for the purpose of bridging the gap between the present rates and the ones held lawful by the Commission.

The Government's argument from its chart is, apparently, that *if* the Western railroads were able to change their prewar loading of 4.3 tons to a postwar average of 10 tons, and *if* all the costs of this traffic, as found by the Commission, be disregarded and forgotten, except those which are out-of-pocket costs, and *if* the Commission had not decided that the permanent scale of rates set out in its report (rather than the interim scale) is to be the just and reasonable one, then the reduced rates would at least cover those out-of pocket costs. *Ergo*, it is proper and not arbitrary for the Commission to hold that the existing rates are unlawful and to order the rates reduced as shown. The defects of that argument are apparent.

The Government's second chart opposite page 240 is not for less-than-carload traffic or for carload class rate traffic, but, instead, is for *all* carload traffic that moves in box cars. When less-than-carload costs are compared with less-than-carload class rates, there is a direct relation. The costs of class rate less-than-carload traffic are the same as the costs

of such traffic on exception or commodity rates and, moreover, most of the total less-than-carload traffic is class-rate traffic. But when carload boxcar costs are compared with carload class rates, the relationship is most remote. In Western territory, the carload boxcar traffic consists largely of such items as wheat, oats, corn and other grains and grain products, cement, lime, fertilizer, salt, canned goods, sugar, lumber, shingles and lath, etc. (R. 11368.) The costs shown on the Government's chart for boxcar traffic represent the costs of moving those heavy loading commodities. The Government would compare them with the class rates, which apply, for the most part, to bulky, light-loading manufactured articles. The Commission did not find and could not reasonably have found that the average composite costs for moving all commodities that are moved in boxcars also measures the costs for the carload class rate traffic. Even counsel for the Government cannot quite bring themselves to say that the costs on that chart are the carload class rate costs, but their presentation of the chart is otherwise entirely irrelevant.

The Government's Computation in the District Court.

Brief reference is made at pages 235-236 of the Government's brief to a computation in an unnumbered exhibit offered by the Government in the District Court but without submitting any witness. The computation shows, and the Government here concedes (p. 235), that the 1939 Western less-than-carload costs, without any allowance for the increases in costs since that date, substantially exceed the revenues from that traffic. After certain adjustments to eliminate from consideration all traffic except the class-rate traffic, the computation concludes that the 1939 costs of this class-rate traffic alone, as found by the Commission, are *23 percent* higher than the interim class rates which the Commission would force upon the Western railroads. (R. 1405,

item 14.) This is without any allowance for the increase in costs since 1939.

The Government then says (pp. 235-236) that if four changes are made in the Commission's cost findings, the result, as so changed, would show that the costs were less than the rates. The first change is to assume that the Commission has raised the revenues $3,000,000 annually by its change in the minimum charge from 55 cents to 75 cents. As shown in our principal brief (pp. 120 to 123), the Commission did not so find. Most minimum charges are collected on the basis of the straight 100-pound rate and the total losses through reductions in that rate much more than exceed the 20-cent increase on the small fraction of that minimum charge traffic. The Government does not deny that this is the fact, but it persists in using the assumed increase of $3,000,000 despite the fact that the collections from total minimum charges (which is the figure used in the Government's computation) would be *decreased* rather than increased. The Government's second adjustment is to eliminate all less-than-carload traffic except class-rate traffic, but its own computation shows that after this is done, the 1939 costs would be 23 percent *higher* than the reduced class rates. (R. 1405, item 14.) The third change is to disregard the normal loading and, without benefit of any finding by the Commission, assume the hypothesis that the post-war loading will be 10 tons, which is higher than either the Western or the national average even under the O. D. T. wartime orders. (See page 28, *supra*.) The last change in the Commission's cost findings would be to change the Commission's rate of return for certain items to the rate earned in 1939. Thus, in the third change, the computation would disregard the actual 1939 costs and transportation conditions such as loading, but, in the fourth change, would reduce the Commission's rate of return to the small rate that the Western railroads were able to earn in that year

under those actual costs and transportation conditions.[1] The extent to which the Government finds it necessary to go in justifying the order by making such unwarranted assumptions and departures from the Commission's findings, demonstrates forcibly that the costs, which were found by the Commission, itself, far exceeds the reduced rates.

The Western Intrastate Rates.

The Government urges that it is lawful for the Commission to force these reductions in the interstate class rates because, in several of the Western states, the intrastate rates for intrastate distances are at levels lower than the interstate rates. (pp. 234-235.) It is said:

> "The carriers have reduced these rates voluntarily, or are maintaining them voluntarily, thus greatly reducing their revenues from less-carload traffic, a situation they have it wholly within their own control to remedy (p. 96, *supra*)."

At page 96 of its brief, to which it refers, the Government defines what it means by "voluntarily" and by the carriers' "own control." It says;

> "These western intrastate class rates are being maintained voluntarily by the carriers in the sense that they have voluntarily put them into effect, or have re-

[1] In a footnote to this statement the Government errs in saying that in adjusting the Commission's 1939 costs to the levels of January 1, 1946, we increased the rate of return figure as well as the expense figures. We made no change in the rate of return or in the dollar amount represented by that item. (The complete working papers of the witness who prepared the adjustment were submitted to the Government (R. 935-936) and analyzed by the Commission's head cost analyst during the hearings. On the basis of that study of the working papers, the Government waived cross-examination; not until its brief in this Court has it ever raised this point.)

> frained from asking the Commission or a court to raise them, *after a state has ordered the present rates.*"[1]

These intrastate rates, the Government thus says, are "voluntary" because the Western states in which they apply have compelled the reductions and the railroads have not sued the Western states to assert their constitutional right of freedom from confiscation. The Government's comment that the Western railroads "have it wholly within their control to remedy" the situation turns out to be merely that the Western railroads have a constitutional right to start a lawsuit to set aside the arbitrary and confiscatory state orders. After thus defining its terms, the Government asks this rhetorical question:

> "If the western carriers voluntarily keep their intrastate rates near or below the Official level, why should they complain of confiscation if the Commission undertakes to bring their interstate rates into alignment?" (p. 97.)

The Government is saying that the Interstate Commerce Commission, after making the most detailed and careful cost findings, is authorized to order the reduction of the interstate rates to levels very substantially below the costs, on the ground that several of the Western states previously have ordered similar reductions for the relatively short intrastate distances and the railroads have not sued to have

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[1] If the intention here is to refer, also, to rates made to meet some particular competitive situation, it is evident that such rates would not be reasonable maximum rates and would not constitute a standard of lawfulness by which to measure other rates. The Commission has always so held. For example, it recently stated: "It is well settled that rates depressed to meet severe competition, as are many of the rail rates on automobiles, afford no proper standard by which to measure a reasonable maximum basis." *New Automobiles in Interstate Commerce*, 263 I. C. C. 771, 779 (1945).

them enjoined. The argument evidently is made seriously, but it is difficult to make a temperate reply. It seems apparent that confiscation by the Commission on interstate rates cannot be defended on the ground that there exists confiscation by certain states on the intrastate rates. There is no finding that the interstate rates are discriminatory in relation to the intrastate rates. Moreover, the Commission has found that the cost studies made by it in this proceeding were the most comprehensive and thorough in the history of railroad rate regulation. (Report, R. 303.) Those studies, of course, were not available to the Western states or to the railroads when the states compelled the intrastate rate reductions. Those findings clearly show the newly-prescribed rates to be noncompensatory. The existence of a confiscatory state-compelled intrastate rate is no defense to this order.

The Evidence and Cost Findings of the Commission Are Proper Evidence of Confiscation.

There is irony in the Government's argument (pp. 245-249) seeking to avoid the use of the evidence and findings of the Commission on the cost of the Western group of carriers as proof of the confiscatory effect of its orders. At one time certain carriers argued to this Court that group evidence did not constitute evidence of the traffic and operating conditions, and of the rates and divisions, of the several carriers in the group. This Court, in a case which is cited in the Government's brief, upheld the contention of the Government and Commission there that such typical evidence was entirely proper. *New England Divisions Case*, 261 U. S. 184 (1923). Indeed, the Government shows that the group comparison method is the only practicable method and says, with respect to each carrier, that there is a "presumption that average conditions are typical of its traffic and operating conditions."

(p. 249.) For some unexplained reason, the Government then argues that this is not harmful to the carriers here because each carrier would be permitted to rebut that presumption. (pp. 248-249.) But we do not seek to rebut any such presumption. The Commission has examined and determined the costs of the Western railroads as a group and has ordered the reduction of those rates to a level far below those costs as measured by it in this proceeding. It has deemed "the evidence of averages * * * to be typical." (p. 249.) The evidence is as clear and probative in the courts as it was in the Commission.

The principal decision relied upon in this connection by counsel for the Government is *Aetna Insurance Co.* v. *Hyde*, 275 U. S. 440 (1928). That case involved an unusual statute of Missouri which authorized the Superintendent of Insurance to reduce rates when he found that the aggregate earnings of the insurance companies in Missouri exceeded an aggregate reasonable profit. The Court stated that the statute did not authorize a determination of the reasonableness of rates when applied to the business of any company. It was not claimed by any company, in the suit to set aside the Superintendent's order, that the rates would be too low to permit it to make a reasonable profit or have just compensation. It was claimed, instead, that the Superintendent had erred in making the only decision which he was authorized to make under that statute:—namely, whether the aggregate amount of collections of all companies was excessive. The Court said:

> "The complaint was framed to secure judicial review (§ 6284) of the determination of the respondent, * * * Neither of the sections authorized a determination of the reasonableness of rates when applied to the business of any company. The complaint did not allege any facts to show that the reduced rates were confiscatory as to any company. The court was not called upon to determine whether the order would operate to

deprive any company of its property without due process of law. It treated the suit as one to obtain the review provided for by § 6284." (pp. 447-448.)

There is nothing in the *Aetna* case to support the Government's theory that the group evidence of costs and the cost findings of the Commission may not be considered as probative on the issue of confiscation in the judicial review of the Commission's order. Here confiscation is claimed by each plaintiff railroad with regard to the rates as applied to its lines. The rates were prescribed under a statute quite different from the Missouri statute. The latter allowed an administrative determination only as to group averages; the individual company was not involved in the findings. Here the Interstate Commerce Act provides for the treatment of railroads on an individual basis. As the Court recently stated in a footnote to its decision in *North Carolina* v. *United States*, 325 U. S. 507, 515 (1945), setting aside a rate order of the Commission for lack of adequate findings to support the reasonableness of the rate prescribed by the Commission:

> "But Congress in 1933, 48 Stat. 211, repealed this part of the 1920 Act; the income pooling system was abandoned; the rule of rate making was re-written, and while the Commission was to give consideration to the need of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service, and to the need of revenue sufficient to enable the carriers under honest, economical and efficient management to provide such service, the rates were no longer to be treated on a national basis as though all railroads constituted one system. House Report No. 193, 73rd Cong., 1st Sess., pp. 30-31. *Railroads were to be treated on an individual basis.*"

In this proceeding, therefore, the Commission necessarily was treating the railroads on an individual basis. It found that the group evidence proved the conditions as to each

railroad, and it found that the class rates of each railroad are unlawful and that the reduced class rates prescribed by it for each railroad are lawful. The Western railroads contend that the evidence before the Commission, as well as the same type of evidence before the Court, proves that the present rates of each Western railroad are lawful and that the newly prescribed rates would be confiscatory as to each Western railroad. The group evidence is probative both in the Commission and in the Court.

The very real dangers contained in the Government's proposition that the group evidence and findings before the Commission are inadmissible in the reviewing court as establishing confiscation are particularly illustrated in connection with the Government's request that this Court, for the first time in its history, refuse to consider evidence offered and received by the District Court on this issue of confiscation. (Government's brief, p. 249.) The Government has taken no appeal from the District Court's order receiving that evidence, and that issue is not before the Court, but the Government's position enlightens its attempt to exclude the group evidence as proof. Taken together, its arguments are that evidence of group averages is proper before the Commission as being typical of the several carriers, but that, upon review of the Commission's order, the carriers not only should be denied the right to offer additional evidence of confiscation but also should be denied the right to show that the findings of the Commission and the group evidence before the Commission, on which the Commission based its action, establish that the order is confiscatory. What would be the results of such rules? For its own protection, each carrier, in the Commission's proceedings, would have to insist on the right to prove the full evidence of its individual costs, operating conditions, etc. despite the fact that the group evidence was typical of its conditions, or else run the risk that it would have for-

feited its right to protest if the order, when announced by the Commission, was confiscatory. The number of Western railroads filing this brief is thirty-three. In the words of the *New England Divisions Case, supra*, to require specific evidence before the Commission in respect to each carrier would be tantamount to denying the possibility of effective administrative action. By the same token, to refuse effect in the courts to the group findings of the Commission, and to require specific evidence in respect to each carrier would be tantamount to denying the possibility of effective judicial protection from arbitrary and confiscatory orders of the Commission.

III.

The Order Is Void Because the Commission Misconstrued the Interstate Commerce Act and the Transportation Act of 1940.

The Government concedes that the Commission took the view that the 1940 amendment to Section 3(1) made a very real change in the law. It argues that the Commission thought that "the law, before 1940, freely permitted discrimination [against territories], as held by the Court below * * *." (p. 82.) The Government says "this is the better view of the 1940 amendment, because otherwise it means nothing * * *." (p. 82.) The Commission thus believed that the law under which it had prescribed the present class rates had been radically altered in 1940. In the words of the Government again: "What it did was to recognize a mandate or direction to bring about 'a greater degree' of equalization and uniformity." (p. 85.) Proceeding to comply with that mandate, it held that all the class rates, which it had prescribed only shortly before in careful and extensive investigations, were made unlawful by the 1940 legislation, that all differences in the terri-

torial rate levels must be abolished and that all the railroads must have the same uniform rates set out in its report.

The Government says, with reference to the Commission's construction of the Act:

"If this was error, it was harmless error." (p. 82.)

But this assumes that the Commission would have reached the same end result if it had heard and determined this proceeding on the correct understanding that the law with respect to the lawfulness of different rate levels in the various parts of the country had not been changed by the 1940 legislation. That assumption is unwarranted. The Court long has held that it will not speculate on whether the Commission would have taken the same action under a correct understanding of the law that it took while under an erroneous understanding,[1] just as it will not speculate upon whether the Commission would or would not have made a finding that it has omitted to make.[2] If the Commission was wrong in its understanding that the factors testing the lawfulness of differing territorial rates in different parts of the country were completely altered by the legislation of 1940, or, if it was wrong in its understanding that it had received a mandate from Congress to change the rates so as to bring about a greater degree of equalization and uniformity than had been established by it prior to the 1940 legislation, and must therefore act under the compulsion of that mandate, the error was by no means a harmless one.

The theory that the Interstate Commerce Act, prior to 1940, freely permitted unjust and undue discrimination

[1] *Ann Arbor R. Co.* v. *United States*, 281 U. S. 658 (1930); *Eastern-Central Motor Carriers Association* v. *United States*, 321 U. S. 194 (1944).

[2] *North Carolina* v. *United States*, 325 U. S. 507 (1945); *Florida* v. *United States*, 282 U. S. 194 (1931).

against territories or other areas of the country is wrong. The prohibition against discrimination in Section 3(1) has always been interpreted as including territories. The Hoch-Smith Resolution, pursuant to which the Commission held its investigations and prescribed the present rates, directed the Commission to investigate to determine whether the rates were "unjustly discriminatory * * * as between the various localities and *parts of the country*" and "to make, in accordance with law, such changes * * * as may be found necessary to correct any defects so found to exist. In making any such change, adjustment or redistribution the Commission shall give due regard * * * to a natural and proper development of *the country as a whole*, and to the maintenance of an adequate system of transportation." (43 Stat. 801, 49 U. S. C. Sec. 55.) The Commission investigated the Western Trunk Line Territory and Eastern Territory class rates contemporaneously, and held, in those companion decisions, that it was adjusting those rates with particular attention to the relation between the territories and subterritories. (See our principal brief, p. 161.) The Government does not deny this. In *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627 (1933), the majority opinion stated, respecting Section 3(1), that "The word 'localities,' therefore, has its proper office as denoting the origin or destination of traffic *and the shipping, producing, and consuming areas affected by rates and practices of carriers.*" (p. 638.) To the same effect, and even stronger, the dissenting opinion stated that "This Court has often declared that the purpose of the all-embracing language of the statute was to suppress every form of unreasonable discrimination which it was within the power of Congress to condemn." (p. 658.) The only difference between the majority and the minority on this subject was whether so-called "gateway" points, such as ports, were within the section with respect

to their gateway traffic. The substantive law forbidding unjust and unreasonable discrimination with respect to territories or other areas or parts of the country was the same before 1940 as it was afterward, and the Commission was in serious error in deciding that the factors determining the lawfulness of the territorial rates were changed by the 1940 legislation.[1]

The Government says that the Commission did not describe the 1940 amendments as a mandate to bring about rate equalization and uniformity, but admits that it did "recognize a mandate or direction to bring about '*a greater degree*' of equalization and uniformity." (pp. 84-85.) We submit, first, that the language and the legislative history of the amendments prove conclusively that the Commission was wrong in believing that it had been directed by Congress to bring about "a greater degree" of equalization. Congress directed the Commission to investigate, but it refused to enact the bills that would have given a mandate either to abolish or to decrease the rate differentials. It intended that the lawfulness of the rates should be tested by the recognized standards. Therefore, rates lawful prior to the legislation in 1940 are also lawful under that Act, in the absence of changed conditions. The Commission had no mandate or direction to reduce the spread between the territorial rate levels. Further, we submit that the best way of determining whether the Commission thought its supposed mandate was to bring about equalization or only to bring about a greater degree of equalization is to examine what it actually has done in this case. Proceeding with express and particular regard for its construction of the 1940 legislation, it has

[1] For a more complete discussion of this point see our principal brief, pp. 159-162; see also the statements in Congress that the 1940 legislation was not intended to change the factors governing the lawfulness of the relative levels of territorial rates, pp. 137-152.

held that, no territorial differences are to be recognized as lawful. From the Rocky Mountains to the Atlantic and from Canada to Mexico, there are not to be allowed any territorial rate differentials. It found cost differences among the territories in the percentages reproduced in our principal brief, and differences in other conditions as described there. But the rates, it held, must now be identical to be lawful. The interim rates are expressly prescribed as a temporary method of achieving, as closely as possible, the lawful uniform rates which, it is held, are to become effective upon completion of the new classification. We believe the Commission's actions, combined with its statements, define its understanding of the scope of the supposed mandate as requiring the uniformity which it prescribed rather than any lesser degree of uniformity. Under either interpretation, however, the fact remains that the Commission fundamentally was wrong in believing that it had been directed by a Congressional mandate to change the rates. That mistake of law vitiates its decision.

The Government, at page 83, urges that this decision fulfills the original purpose of the Interstate Commerce Act, saying: "The very thing Congress sought to achieve by Section 3(1), starting in 1887, was equality of rates." It is appropriate, therefore, to note that in 1887 the suggestion was made to the Commission that the purpose of the Act was to establish uniform and identical rates, mile for mile, throughout the country, and, in effect, that Congress, in the Act, had given the Commission a mandate to do so. The Commission, however, did not so construe the Act and stated, in its First Annual Report (1887) as follows:

> "It might possibly be within the competency of the legislative power to prescribe for the several interstate railroads equal mileage rates for the whole coun-

> try; but this, if enforced, * * * would, in fact, work a revolution in the business of the country, which, though it might be greatly beneficial in some directions, would be fearfully destructive in others. Congress has not by the existing legislation undertaken to inaugurate such a revolution; nothing in the act to regulate commerce looks in that direction * * *." (p. 40.)

Similarly, nothing in the Act today looks in the direction of the prescription of equal mileage rates for the whole country. Arguments in behalf of so changing the Act have been made to Congress and all have been rejected by it. The language quoted above applies to the 1940 legislation as well as to the original Act.

Finally, the Government says that it agrees with us "that equality is only justified if circumstances and conditions are substantially the same," (p. 83) and repeats the same qualification at many places. *But the Commission has made no finding that circumstances or conditions are substantially the same.* The original and supplemental reports of the Commission will be read in vain for any such finding. It is not quoted by the Government and it simply is not there. The Commission measured the amounts of the differences in costs and in density of traffic and other conditions as discussed in our principal brief and in the foregoing portions of this brief. We do not believe that it reasonably could have found that the large cost differentials and differentials in other conditions, West-East and West-South, were not substantial, but, at any rate, it made no such finding. Under its interpretation of the statute and under its supposed mandate it ordered the establishment of uniformity *despite* the differences which it found to exist; it did not deny that they exist or that they are substantial.

CONCLUSION.

For the reasons stated in our principal brief, and in this reply, it is respectfully submitted that the final decree of the court below should be reversed, and that the Commission's orders in *Class Rate Investigation, 1939,* I. C. C. Docket No. 28300 should be permanently annulled and set aside and their enforcement enjoined.

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March 3, 1947.

APPENDIX.

The following letter was served on all counsel immediately after the filing of our principal brief:

February 12, 1947.

Re: Brief for The Atchison, Topeka and Santa Fe Railway Co., *et al.*, filed February 10, 1947, in Causes Nos. 343, 344 and 345, United States Supreme Court, October Term, 1946.

To all Counsel:

1. The amount of the reduction which would have been caused to the revenues of the Western railroads in 1939 if the Western revenue level had been reduced to the Eastern revenue level, and the amount of the resulting Western operating deficit, are stated at pages 28-29 and at page 61 of our brief. The reduction stated on page 28 is $183,270,259, and the resulting deficit stated on page 29 is $5,154,703. The former figure, which is taken directly from the Commission's studies (Ex. 196, p. 15, R. 11373) represents 16.5599 percent of the constructive Western gross freight revenues on the Eastern revenue level, as found by the Commission's studies. The Commission rounded out the fraction to 16.6 percent (R. 221, 11373). The table on page 61 of our brief is computed by using the Commission's figure of 16.6 percent. The difference in the disposition of fractions results in a difference between the 1939 reductions and deficit, as shown on pages 28-29, and those shown in the table on page 61.

2. The last phrase in the sentence at the bottom of page 28 and the top of page 29 should be changed to read as follows: "which is approximately 16.6 percent of the

constructive Western gross freight revenues of $1,106,709,320." The sentence will then read as follows:

> "If the Western railroads had been forced to reduce their rates to a revenue level identical with the Eastern revenue level, the net railway operating income of the Western railroads would have been reduced by $183,270,259, which is approximately 16.6 percent of the constructive Western gross freight revenues of $1,106,709,320."

3. The foregoing statements will be included in the reply brief of the Western railroads.

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Attorneys for The Atchison, Topeka and Santa Fe Railway Company, et al.

cc-CHARLES ELMORE CROPLEY, ESQ.,
Clerk, United States Supreme Court.